No. 11,619

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH PITTA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 36) of the District Court of the United States for the Northern District of California, Southern Division, convicting the defendant after a jury trial, of a violation of the Jones-Miller Act (21 U.S.C. §174). The indictment was in 56 counts and charged the appellant and others, with violations of the narcotic laws of the United States and with conspiracy. The appellant went to trial on one count of this indictment, to-wit, the 23rd count, which alleged in substance that the appellant and one Vincent Bruno, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative

and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew (Tr. 13 and 34-36).

The Court below had jurisdiction under the provisions of Title 28 U.S.C. §41, sub-division 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, U.S.C. §225, sub-divisions (a) and (d).

STATEMENT OF FACTS.

The Federal Narcotic Agents testified that during the month of January and February, 1946, they had under observation a bar room in the City and County of San Francisco known as the Star Dust Bar.

That on the 10th day of January, 1946, they had secreted themselves in a room in the rear of the Star Dust Bar, from which position they had at all times a liquor storeroom of the Star Dust Bar under observation.

At about seven-thirty on the evening of January 10th, one of the agents entered the liquor storeroom and removed from between some beer cases a paper. The agents took from this paper a small quantity of a powder and then one of the agents refolded the paper and returned it to its place of concealment. The powder which they took from the paper was identified by a Government chemist as heroin hydrochloride.

Later that evening, about 10:45 p.m., the agents observed Vincent Bruno enter the liquor storeroom from the rear of the Star Dust Bar with appellant. Bruno locked the door behind him. Bruno removed the paper the agents had previously examined from between the beer cases, opened the paper and, using a penknife, took some of the contents of the paper and with the penknife snuffed the contents into his nostrils. Bruno then passed the paper and the knife to appellant. Appellant then took some of the substance on the knife and inhaled it into his nostrils. Appellant refolded the paper and returned it with the penknife to Bruno who replaced it between the beer cases.

The above constituted the case of the Government.

The appellant called certain witnesses to testify concerning the physical makeup of the room in question with the end in view of showing that the Government agents could not have seen what they testified to. No point is being made to this effect on this appeal.

The appellant was called as a witness on his own behalf. He testified that over a period of a couple of years he had gone to the Star Dust Bar to exchange liquor about two to four times. That he was never there as late as 10:30 at night and that he did not know whether he was there on January 10th. He said he was in the bar and restaurant business in Oakland and also took care of his father's ranching properties. He said he had been convicted of felony in 1940 in San Diego. He denied being in the liquor room of

the Star Dust Bar on January 10, 1946 with Vincent Bruno and using a bindle of heroin. He denied he possessed a bindle of heroin at that time.

QUESTIONS.

1. Is the possession of narcotics for the purposes of use sufficient to justify a conviction?

2. Was the jury improperly instructed?

ARGUMENT.

I. POSSESSION FOR PURPOSES OF USE IS SUFFICIENT TO JUSTIFY A CONVICTION.

It has been held uniformly that the possession of narcotics is sufficient to justify conviction, under the presumption raised by the statute,[1] unless the defendant explains his possession to the satisfaction of the jury.

Ng Choy Fong v. United States (CCA-9), 245 F. 305, certiorari denied 245 U. S. 669;

Rosenberg v. United States (CCA-9), 13 F. (2d) 369;

Hooper v. United States (CCA-9), 16 F. (2d) 868;

Gee Woe v. United States, 250 F. 428, certiorari denied 248 U. S. 562.

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[1] "* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U.S.C. §174.)

Therefore, having once proved possession of the narcotics in the defendant, it is not necessary for the Government to go further and prove that the acts of the defendant amounted to "concealment" or "facilitating the concealment" of the narcotics as these terms may be defined in the dictionary. The proof of possession immediately raises the presumption, which the defendant must rebut. The case of *Pon Wing Quong v. United States* (CCA-9), 111 F. (2d) 751, cited by the appellant, in our opinion, serves to emphasize this point. In that case the defendant was not shown to ever have had actual possession of the narcotics. The only evidence introduced against him, other than his confession, was to the effect that he, a baggageman, had placed a sticker upon a trunk containing the narcotics for the purpose of having it released from the baggage corral without customs inspection. Under these facts it became necessary for the Court to analyze the language of the charging portion of the statute to determine if the defendant's actions amounted to "importation" or "facilitating the transportation or concealment" of the narcotics. Had it been shown that the defendant had been in possession of the trunk or its contents this question would not have arisen as the presumption would have been sufficient to justify conviction.

Appellant seems to argue that there are degrees of possession; that possession for purposes of use is different from possession for purposes of sale, or purposes of transportation or any other similar purpose. We do not believe that the statute is susceptible of such an interpretation.

First. The language of the statute is clear and unequivocal. The word "possession" is unqualified. Possession itself must be "explained to the satisfaction of the jury".

Second. The language used in the statute merely enacts a rule of evidence that proof of one fact shall constitute *prima facie* evidence of the main fact in issue. Therefore, inquiry into the "degree" of possession is idle.

Yee Hem v. United States, 268 U. S. 178;
Charley Toy v. United States, 266 F. 326, certiorari denied 254 U. S. 639.

Third. No one of the cases touching upon this point questions the "degree" or the "quality" of the possession. On the contrary, they assume that possession is sufficient proof of guilt unless the defendant proves that his possession was lawful. Note that it is not sufficient for the defendant to prove that his possession was "temporary" or "limited" or "qualified" but he must prove it was "lawful".

Hooper v. United States (CCA-9), 16 F. (2d) 868;
U. S. v. Feinberg, 123 F. (2d) 425, certiorari denied 315 U. S. 801;
U. S. v. Moe Liss, 105 F. (2d) 144.

In the latter case the Court said, at page 146:

"So it is accurate to say that the explanation of possession, if it is to serve the defendant's purpose, must not only be believed by the jury but must also be one that shows a possession lawful under the statute, *citing cases.* It goes without

saying that Congress did not intend that an explanation which showed guilty knowledge by the defendant would suffice."

In *Gonzales v. United States,* 162 F. (2d) 870, decided by this Court on June 20, 1947, Judge Stephens said:

> "A mere reading of the above-quoted language (quoting from Yee Hem v. United States, 268 U. S. 178) clearly shows that the satisfaction of the jury as to the explanation *turns upon whether or not the possession was within the exceptions provided in the statutes."* (Emphasis supplied.)

Possession for the purpose of illegal use by a narcotic addict is clearly not within the exceptions provided in 21 U.S.C. §173, which permits the importation of such amounts of narcotics as the "Board finds to be necessary to provide for medical and legitimate uses only".

Fourth. The purpose of the statute, as explained by the decisions, makes it clear that Congress intended *any* possession to be sufficient to raise the presumption and to place upon the defendant the burden of proving lawful possession.

In *Ng Choy Fong v. United States* (CCA-9), 245 F. 305, certiorari denied 245 U. S. 669,

this Court said:

> "* * * in order to make the law as effective as might be, Congress, in its wisdom, meant to facilitate the practical administration of the statute by establishing these rules: (1) That if, upon trial, a person is shown to have had opium il-

> legally imported in his possession, such possession shall be deemed enough evidence to authorize conviction unless such possessor shall explain the possession to the satisfaction of the jury. (2) That after July 1, 1913, all opium found shall be presumed to have been imported since April 1, 1909, and the accused must take it upon himself to rebut this presumption."

The Supreme Court in *Yee Hem v. United States,* 268 U. S. 178, recognized the purpose of the presumption when it said at page 184:

> "* * * By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress."

Fifth. The whole purpose of the statute is to stamp out the very existence of narcotics in the United States except for legitimate medicinal purposes. See *Ng Choy Fong v. United States,* 245 F. 305. (It may be worthwhile to note that heroin, the drug involved

in this case, both in fact and under the regulations of the Treasury Department has no legitimate medical use and is absolutely prohibited in the United States.) While we sympathize with the unfortunate addict, who is a victim of his own weakness, we must also realize that the addict is the principal reason for the existence of illegal narcotics and the sole reason for the presence of the seller in our midst. Proper and efficacious enforcement of the law demands the elimination of the user as well as the purveyor. Keeping in mind the obvious purpose of Congress in enacting the law and the goal which it aimed to achieve, it is unlikely that it intended to make possession for purposes of sale or any other purpose *prima facie* evidence of guilt and, at the same time, permit possession for purposes of use to be innocent.

We do not believe that the cases relied upon by the appellant, all arising under liquor control laws either of the State or Federal Government, are applicable in the case at bar. In those cases the Courts were concerned with a problem of *substantive* law, i.e., the criminal possession of liquor, and it became necessary to define the type of possession which would constitute a crime. There are many similar statutes, such as possession of stolen government property, of property stolen in interstate commerce and of property stolen from the mails. It may well be that the Courts in determining guilt under such statutes may say that the possession sufficient to justify conviction must be of a certain character; that, for example, it must show dominion and control rather than mere momentary

possession for the purpose of inspection or examination.

In the instant case, as stated above, however, we are not concerned with a question of *substantive* law but with a rule of evidence. We do not argue that under the statute in question possession of narcotics, for any purpose, is itself a crime but rather that possession "shall be deemed *sufficient* evidence to authorize conviction" (of the crime of concealing or facilitating the concealment of narcotics) "unless the defendant explains the possession to the satisfaction of the jury".

Considered in this light, what greater "degree" of possession can one have than a possession which entitles the possessor to consume that which he possesses?

II. THE JURY WAS PROPERLY INSTRUCTED.

Appellant's objections to the instruction complained of are three-fold. First, that it limited the jurors to a consideration of the Government's testimony, disregarding that of the defense. Second, that it eliminated from the jury's consideration the possibility that the government's witnesses might be mistaken. Third, that it prevented the consideration of the appellant's "explanation" of his possession of the narcotics.

An analysis of the instruction shows that the first difficulty is an imaginary one. The agents testified that the appellant was in a certain room at a certain

time and in possession of narcotics. The appellant denied that he was in the room at that time and that he had narcotics in his possession. As the Court said, the case revolved about a simple issue of fact; either the agents saw the appellant in possession of narcotics or they did not. Hence, a flat contradiction was established; both stories could not possibly be true. Therefore, in order for the jury to believe that the agents told the truth they must necessarily have believed that the appellant did not tell the truth. Instead of disregarding the appellant's testimony, the jury would have to consider and reject it in order to believe that the agents told the truth. In effect, the instruction stated "You have heard two stories; both cannot be true. In order to believe one you must reject the other. If you believe that the Agents told the truth and that they saw the appellant at the time and place mentioned and in possession of narcotics, you must reject the appellant's statement that he was not there and bring in a verdict of guilty. If on the other hand, you do not believe that the Agents told the truth and that they did not see the appellant, you may believe the appellant's statement that he was not there and you may bring in a verdict of not guilty".

The second objection, that the instruction eliminated the possibility that the agents might be mistaken, upon close scrutiny, also seems more chimerical than real. As an abstract philosophical problem it is interesting but as a practical, legal objection it is without merit.

According to one school of thought it would be impossible for the agents to have told the truth and to

have been mistaken as to the facts upon which they based their conclusion. Another would recognize the possibility of their having been mistaken and still having told the truth as they saw it. In common usage, however, the phrase "If you believe the agents told the truth" coupled with the instructions on the presumption of innocence and on reasonable doubt, conveyed to the jury the idea that in arriving at their conclusion they need not rule out the possibility of mistake. In its deliberations a jury is concerned with the "truth" of objective facts and not with abstract truth. It does not seem plausible, in our opinion, that the language of this instruction foreclosed the jury from considering the possibility that the agents might be mistaken. If it did not, there is no error, as it cannot be maintained that the Court should have gone further and explicitly cautioned the jury to beware of the possibility of mistake.

The final objection, that the instruction eliminated any explanation by the appellant to offset the presumption raised by the possession of narcotics is, in our opinion, entirely without merit. The necessity of explaining possession of narcotics to the satisfaction of the jury, i.e., proving that the possession was lawful or innocent, can only arise where the defendant admits possession and then goes further to explain it. To "explain" that you had lawful possession of something which you deny having possessed is a logical impossibility.

It is an accepted principle that instructions should be construed as a whole and that detached phrases

and sentences should not be singled out and considered alone in determining the correctness of the instructions.

Morrissey v. United States (CCA-9), 67 F. (2d) 267, certiorari denied 293 U. S. 566;

Hargreaves v. United States, 75 F. (2d) 68, certiorari denied 295 U. S. 759.

If we apply these principles to the case at bar and read the charge to the jury in its entirety it becomes clear that the jury was properly instructed.

Furthermore, an instruction of identical import has been approved by this Circuit. In *Sunquist v. United States* (CCA-9), 3 F. (2d) 433, the following instruction was held to be proper:

> "* * * the evidence introduced by the government, if believed by you, is sufficient to warrant and sustain a verdict at your hands of guilty."

Finally, no objection was taken to the instruction in the trial Court. Rule 30 of the Rules of Criminal Procedure, which codifies the ruling case law on this point and prohibits the assignment of error where no objection is taken, should be followed.

CONCLUSION.

For the reasons stated we respectfully submit that the conviction should be affirmed.

Dated, San Francisco, California,
October 24, 1947.

Respectfully submitted,

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